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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1040

NORFOLK MONUMENT COMPANY, INC.,
Petitioner,
vs.
WOODLAWN MEMORIAL GARDENS, INCORPORATED,
ROSEWOOD MEMORIAL PARK, INCORPORATED,
GREENLAWN CEMETERY PARK CORPORATION,
ROOSEVELT MEMORIAL PARK AND CEMETERY CORPORATION,
PRINCESS ANNE MEMORIAL PARK, INCORPORATED,
JAS. H. MATTHEWS & CO. OF VIRGINIA,
and
JAS. H. MATTHEWS & CO.,
Respondents.

BRIEF FOR THE RESPONDENT, ROOSEVELT MEMORIAL PARK AND CEMETERY CORPORATION, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit, in which it affirmed the decision of the District

Court, is reported in F.2d and is printed in the Appendix to petitioner's brief at pages 1a-25a. The memorandum opinion of the United States District Court for the Eastern District of Virginia, Norfolk Division, filed October 3, 1967, is reported in 290 F. Supp. 1 and is printed in the Appendix to petitioner's brief at pages 31a-36a. The order granting summary judgment for this respondent, Roosevelt Memorial Park and Cemetery Corporation, filed October 28, 1966, is printed in the Appendix to this brief at pages 14a-15a. The order sustaining the other six respondents' motions for summary judgment, filed November 14, 1967, is printed in the Appendix to petitioner's brief at pages 29a-30a.

JURISDICTION

The petitioner seeks a writ of certiorari under 28 U.S.C.A. 1257 (3) (Appendix to this brief, p. 22a), which relates only to reviews of final judgments rendered by the highest Court of a State. The decision affirming the judgments of the District Court, which petitioner seeks to have reviewed by this Court, was entered by the United States Court of Appeals for the Fourth Circuit, on November 18, 1968. This respondent, therefore, moves this Court to dismiss the petition for writ of certiorari on the ground that the jurisdiction of this Court has not been properly invoked.

THE QUESTION PRESENTED

Petitioner seeks a review and a reversal by this Court of the decision of the Court below which affirmed the judgments of the District Court.

The only question before this Court on this petition is whether there is anything about this case which war-

rants the attention of this Court. Respondent submits that there is not. The Court below correctly affirmed the decision of the District Court in entering summary judgment dismissing petitioner's complaint under Rule 56 (c) (e), *Federal Rules of Civil Procedure,* as amended, because petitioner failed to establish any genuine issue as to any material fact, as to this respondent, after this respondent made and supported its motion for summary judgment as provided by Rule 56 (e), *Federal Rules of Civil Procedure.* Moreover, the Court below correctly affirmed the decision of the District Court in entering summary judgment in favor of the remaining six respondents because petitioner failed to establish a genuine issue of fact as to the existence of a conspiracy or agreement between these respondents, or any of them, after said respondents had properly made and supported their motions.

In sustaining respondents' motions for summary judgment, the District Court held (Appendix to petitioner's brief, pages 35a-36a):

> "The plaintiff has been required, under proper appropriate motions, to produce his case. He has said in depositions that he has no evidence other than that proffered. Clearly, the evidence fails to state a case under the Sherman Act.
>
> "To put these parties to trial runs full face into the intent and purpose of Rule 56 of the Federal Rules of Civil Procedure. There not only is no genuine issue of material fact of conspiracy, there simply is no evidence of conspiracy at all and the plaintiff has said he could produce nothing more."

THE STATUTES INVOLVED

Petitioner alleged violations of the Sherman Act, 15 U.S.C.A., Sections 1 and 2. The pertinent text of those statutes are printed in the Appendix to this brief at page 22a.

The motions for summary judgment were made under Rule 56 of the Federal Rules of Civil Procedure. The text of this Rule is printed in the Appendix to this brief at pages 19a-21a.

Petitioner has attempted to invoke the jurisdiction of this Court under 28 U.S.C.A. 1257(3). The text of this statute is printed in the Appendix to this brief at page 22a.

STATEMENT OF THE CASE

Norfolk Monument Company, Inc., a local retail dealer in cemetery monuments, who also sells bronze cemetery markers, charges this respondent, Roosevelt Memorial Park and Cemetery Corporation, and four other incorporated cemeteries and also Jas. H. Matthews & Co. of Virginia and Jas. H. Matthews & Co., a maker of rubber stamps for stamping corrugated and paper boxes and a manufacturer of bronze memorial plaques, respectively, with an antitrust combination and conspiracy in violation of Sections 1 and 2 of the Sherman Act.

The respondent, Roosevelt, is a Virginia corporation, which owns and operates one small cemetery or memorial park in the City of Chesapeake, Virginia. It sells burial lots in its local cemetery and bronze markers only to its lot owners. Its sale of bronze markers has never in any one fiscal year exceeded $12,000.00. It is a

miniature company in comparison to the size of petitioner.

Petitioner's Complaint, filed December 16, 1965, seeking treble damages and injunctive relief, charges that this respondent has for "many years" prior to the commencement of this suit, by agreement and concerted action with the other respondents, restrained the production, sale, and distribution of grave markers and that the respondents have combined and conspired to monopolize, have attempted to monopolize, and have monopolized interstate trade and commerce therein.

Petitioner's Complaint sets out numerous trade practices which it claimed were in violation of the Sherman Act. However, petitioner's brief to this Court seems to abandon all of these claims as against this respondent. The only specific statement of fact in reference to Roosevelt in petitioner's brief, is that, "All of the memorial parks, except Roosevelt, are customers of Matthews." (page 6, petitioner's brief).

Roosevelt's amended motion for summary judgment (Appendix to this brief, pages 1a-8a) was filed May 3, 1966, and the order granting summary judgment for Roosevelt (Appendix to this brief, page 14a) was entered, "after giving the plaintiff ample opportunity to present all material pertinent to such motion," on October 28, 1966, more than four months before any one of the other respondents filed its motion for summary judgment. Roosevelt's motion for summary judgment was argued before and granted by the Honorable Walter E. Hoffman, United States District Judge; the other respondents' motions were argued before and granted by the Honorable John A. MacKenzie, United States District Judge.

Petitioner's statement on page 5 of its brief that, "The District Court granted summary judgment on the sole ground that petitioner failed to present evidence of a conspiracy among the respondents," is not accurate as far as this respondent is concerned. The District Court granted summary judgment to Roosevelt in accordance with Rule 56, *Federal Rules of Civil Procedure,* as amended, on the ground that it had not been guilty of the offenses charged in the Complaint as a matter of law..

Both trial judges held that petitioner had not set forth specific facts, in accordance with Rule 56, *Federal Rules of Civil Procedure,* as amended, showing that there was a genuine issue for trial. Petitioner now states, in effect, that both trial judges committed reversible error in so holding, and that the Court of Appeals was also in error in affirming each and every one of the respondents' summary judgments. But petitioner does not advance any new or compelling reason why the decision below is wrong. Petitioner does not complain that it needed more discovery. Nothing was withheld from petitioner. All the facts and petitioner's interpretations thereof were before the Courts below. All were rejected as being of no probative value. Petitioner here is merely repeating the conclusions, interpretations, and speculations which were before the Courts below and which were considered and rejected by both.

The District Court had before it Roosevelt's amended motion for summary judgment and amended affidavit of Eugene P. Wadsworth, its president, in support thereof (Appendix to this brief, page 1a) and petitioner's affidavit of Charlie C. Gregory in opposition to amended affidavit of Eugene P. Wadsworth (Appendix to this brief, page 9a). The District Court also had

before it extensive discovery depositions of Charlie C. Gregory, President of Norfolk Monument Company, Inc., taken on June 2, 1966, and further discovery depositions of Charlie C. Gregory taken on July 19, 1966. In addition, the District Court had before it petitioner's interrogatories, and the respondents' answers thereto, numerous exhibits of petitioner introduced at the taking of the aforementioned depositions, and documents filed by respondents in response to petitioner's motion for production. Petitioner's whole case was before the Courts below.

Petitioner has advanced no reason, in accordance with Rule 19 of the *Revised Rules of the Supreme Court of the United States,* why the decision of the District Court, as affirmed by the Court below, should be reviewed. No question is presented which has not been, but should be, decided by this Court. No question is presented which has been decided in a way in conflict with applicable decisions of this Court.

ARGUMENT

Petitioner has advanced no reason why the writ should issue.

A. Petitioner Did Not Meet the Requirements of Rule 56 of the Federal Rules of Civil Procedure, As Amended.

Rules 56 (c) and 56 (e) of the *Federal Rules of Civil Procedure* were amended, January 21, 1963, effective July 1, 1963. The question before this Court is whether the Court below erred in affirming a judgment for Roosevelt under Rule 56. The pertinent parts of Rule 56 state as follows:

> "(c) *Motions and Proceedings Thereon.* The motion shall be served at least 10 days before the

time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. . . .

"(e) *Form of Affidavit; Further Testimony; Defense Required.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The Court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

Rule 56 was amended by this Court for the purpose of effectuating the interest of the rule and to dispose of non-meritorious claims, such as petitioner's, without the necessity for a prolonged trial that could only result in

a judgment for the moving parties. As the Court said in *Seago* v. *North Carolina Theatres,* 42 F.R.D. 627, 633 (E.D.N.C. 1966), affirmed 388 F.2d 987, cert. den. 390 U.S. 959, a civil antitrust action under the Sherman Act, in sustaining defendants' motions for summary judgments:

> "Plaintiff is now required, based upon personal knowledge, to set forth such facts as would be admissible in evidence and show that he is competent to testify with respect to such matters. Rule 56 (e) of the Federal Rules of Civil Procedure was amended to take care of a too rigid standard on motions for summary judgment and to enable the Court, after extensive pre-trial discovery proceedings, to dispose of litigation without the necessity for a protracted trial. This is plainly set forth in the Advisory Committee's Notes with respect to the last two sentences in Rule 56 (e), which constitute the amendment to that section of the rule in 1963. Those notes read, in part, as follows:
>
> > 'The last two sentences are added to overcome a line of cases, chiefly in the Third Circuit, which has impaired the utility of the summary judgment device. A typical case is as follows: A party supports his motion for summary judgment by affidavits or other evidentiary matter sufficient to show that there is no genuine issue as to a material fact. The adverse party, in opposing the motion, does not produce any evidentiary matter, or produces some but not enough to establish that there is a genuine issue for trial. Instead, the adverse party rests on averments of his pleadings which on their face

present an issue. In this situation the Third Circuit cases have taken the view that summary judgment must be denied, at least if the averments are "well pleaded," and not suppositions, conclusory, or ultimate.' (citations omitted).

'The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial. The Third Circuit doctrine, which permits the pleadings themselves to stand in the way of granting an otherwise justified summary judgment, is incompatible with the basic purpose of the rule. See 6 *Moore's Federal Practice* 2069 (2d Ed. 1953); 3 *Barron and Holtzoff*, supra, #1235.

'It is hoped that the amendment will contribute to the more effective utilization of the salutary device of summary judgment.' "

The Advisory Committee's Notes have also been given effective force by the Courts in *Markwell* v. *General Tire and Rubber Company*, 367 F.2d 748, 750 (7th Cir. 1966); and *Scarboro* v. *Universal C.I.T. Credit Corporation*, 364 F.2d 10, 15 (5th Cir. 1966). In each case a summary judgment was affirmed.

The express language of Rule 56 (e) required petitioner to go forward with affidavits or as otherwise provided in the rule. Petitioner was required to set forth specific facts on his personal knowledge which would be admissible in evidence, showing that this respondent's affidavit was not true and that there was a genuine issue of fact for trial. Plaintiff was unable to make such a

showing and the District Court held (Appendix to this brief, page 14a):

> "And it appearing from the pleadings together with the amended affidavit of Eugene P. Wadsworth, dated the 3rd day of May, 1966, and the counter-affidavit of Charlie C. Gregory (filed May 25, 1966), that the said defendant, Roosevelt Memorial Park and Cemetery Corporation, has not been guilty of the offenses charged in the Complaint, and that the plaintiff in its opposing affidavit has set forth no specific facts as required by Rule 56 (c) showing that there is a genuine issue for trial, as provided by Rule 56 of the *Federal Rules of Civil Procedure,* to support its conclusory and unsworn allegations, the Court is of the opinion that the defendant, Roosevelt Memorial Park and Cemetery Corporation, is entitled to a judgment as a matter of law."

At no place in petitioner's brief does he come to grips with the question before this Court. He barely mentions Rule 56 and the specific requirements of Rule 56 (e). He has resorted, instead, to a line of antitrust decisions which deal with conspiratorial action and other similar violations of the antitrust laws.

In *Poller* v. *Columbia Broadcasting System, Inc.,* 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962), which petitioner cites on page 9 of its brief, there had been meetings, conferences, contracts, and takeovers between and among the defendants. There is no evidence in the case at bar of any meetings, conferences, contracts, correspondence, or dealings of any nature between this respondent, Roosevelt Memorial Park and Cemetery Corporation, and any of the other alleged conspirator-

defendants. Roosevelt has never purchased grave markers from Matthews or dealt with Matthews in any way. Petitioner's allegation in its affidavit in opposition (Appendix to this brief, page 9a) as to a "take over" of Roosevelt is obviously hearsay as to Roosevelt and totally without merit.

Here, in the case at bar, the District Court found that Roosevelt had not been guilty of the offenses charged in the Complaint and, therefore, was entitled to judgment as a matter of law. The decision of the Court of Appeals does not conflict with the decision in *Poller* v. *Columbia Broadcasting System, Inc.,* supra.

The decision of the Court of Appeals is not in conflict with *Interstate Circuit* v. *United States,* 306 U.S. 208, 59 S.Ct. 467, 83 L.Ed. 610 (1939), because in the Interstate case the movie exhibitor-defendants had sent a letter to each of the distributor-defendants, naming all of the distributors as addressees, in which they expressly requested that the distributors comply with certain restrictive practices. The distributors accepted the written proposal by simultaneously imposing identical restrictions. In the case at bar, there is no evidence of any communication between Roosevelt and any of the other defendants. If there is any conspiracy to be found, Roosevelt got no "invitation" and there is no showing that Roosevelt knew anything about it. There is no circumstantial evidence of conspiracy as far as Roosevelt is concerned.

Moreover, Roosevelt has no motive to join any conspiracy with Matthews or the other cemetery defendants. Here, Norfolk Monument Company is unable to point to any benefits to be obtained by Roosevelt in entering

into any agreement with the other defendants. Roosevelt is the only defendant located in the City of Chesapeake, Virginia, and does not serve the same market as the defendant cemeteries. All deceased buried in Roosevelt's cemetery are of the Negroid race, whereas the deceased buried in the other defendant cemeteries are of the Caucasian race. This fact is uncontradicted (See Appendix to this brief, page 7a). In addition, Norfolk Monument Company, Inc., did not and cannot point out any benefits that Roosevelt could obtain in entering into an agreement with Matthews because Roosevelt has never purchased anything from Matthews (See Appendix to this brief, page 6a and petitioner's brief, page 6) and has never been associated with Matthews in any way, other than as a defendant in this case.

Therefore, no logical inference of conspiracy or concerted action would arise as to Roosevelt even if petitioner had set forth admissible evidence probative of uniform charges and operations among the respondents. The evidence of parallel behavior to which petitioner points does not exist in the record or in fact. Even if legally significant evidence of parallel behavior had been produced in accordance with Rule 56 of the Federal Rules of Civil Procedure, only an inference of independent action by Roosevelt would logically follow because Roosevelt has no motive to conspire with any of the other respondents. Petitioner may not rest on his allegations and, therefore, on the facts as shown, summary judgment was correctly awarded to respondent, Roosevelt. *First Nat. Bank* v. *Cities Service Co.,* 391 U. S. 253, 287-288, 20 L.Ed.2d 569, 591-592, 88 S. Ct. 1575, (1968).

In *Kiefer-Stewart Co.* v. *Joseph E. Seagrams & Sons,* 340 U.S. 211, 71 S.Ct. 259, 95 L.Ed. 219 (1951) which petitioner cites on page 10 of its brief, there had been conferences and meetings between the defendants concerning sales to plaintiff; and after said meetings, defendants sold to plaintiff's competitors on identical terms as to fixed retail price ceilings, but defendants, by concerted action, had agreed not to sell to plaintiff unless plaintiff agreed to a fixed maximum resale price.

Petitioner states at page 10 of its brief that the Court in *Eastern States Retail Lumber Dealers Ass'n* v. *U.S.,* 234 U.S. 600, 612, 34 S.Ct. 951, 58 L.Ed. 1490 (1914) ruled that:

> "In order to show a combination or conspiracy with the Sherman Act, no agreement need be shown under which the concerted action is taken since it is elementary that conspiracies are seldom capable of proof by direct testimony and may be inferred from things actually done."

This is not what that case ruled. The Court in that case ruled that a conspiracy could be inferred from the concerted action of various defendant lumber associations, composed largely of retail dealers from several states who had expressly associated themselves as members of said associations, in periodically reporting in written bulletins the names of wholesalers who had made sales directly to consumers. In addition, it was the declared purpose of said defendant associations, as disclosed by their constitutions and by-laws, to prevent wholesalers from selling directly to consumers by refusing to buy from them if they did sell directly to consumers.

At no place in its brief or elsewhere does petitioner even claim that the findings of fact and conclusions of the District Court are not supported by the evidence or that the Court needed more evidence. Rather than point to the respects in which the District Court erred, petitioner has resorted to a listing of the aforementioned unrelated and clearly distinguishable anti-trust decisions and has advanced the contention that on the evidence before the Court a jury might conceivably have found for petitioner. Petitioner's unsupported allegations, conjectures, speculations, and generalities will not do in face of the record made in the District Court.

B. Respondent, Roosevelt's Summary Judgment Under Rule 56 (c) (e), Federal Rules of Civil Procedure Was Appropriately Granted.

Summary judgment was appropriately granted to respondent, Roosevelt. Petitioner has evaded the burden upon it to meet the requirements of Rule 56 on Roosevelt's motion. It has not come forth with specific facts based on personal knowledge which would be admissible as evidence tending to prove that Roosevelt became a party to the alleged conspiracy. And as this Court ruled in *Theatre Enterprises, Inc.*, v. *Paramount Film Distributing Corp.*, 346 U.S. 537, 540, 98 L.Ed. 273, 74 S.Ct. 257 (1954):

> "The crucial question is whether respondents' conduct toward petitioner stemmed from independent decision or from agreement, tacit or express."

Eugene P. Wadsworth, in Roosevelt's amended affidavit (Appendix to this brief, page 5a) attached to its amended motion for summary judgment, said in part that Roosevelt has never refused to install for plaintiff,

or any other marker dealer, grave markers in its cemetery; that Roosevelt has on no occasion adopted or ever, in any way, combined, conspired, or agreed to adopt either directly, or indirectly, expressly or by implication, any restrictive device, regulation, or rule prepared or suggested by any of the defendants for the purpose of preventing, restricting, or discouraging sales of markers by the plaintiff or any other marker dealer for installation in its cemetery. These facts and denials were unopposed and uncontradicted by petitioner's affidavit in opposition (Appendix to this brief, page 9a) or by any other admissible probative evidence.

As the Court said in *Seago* v. *North Carolina Theatres,* supra, 632:

> "The Court agrees in part with the plaintiff in that the affidavits are full of conclusions and general denials, but this does not mean that the defendants' affidavits are to be thrown out and cast aside as these affidavits also state evidential facts as required by Rule 56 (e) of the Federal Rules of Civil Procedure. This Court, therefore, holds and decides that those affidavits were in fact sufficient to cause the plaintiff to go forward with affidavit or other means to show evidentiary facts as required by the Federal Rules. . . . Besides the affidavits presented by defendants, there are also the depositions taken by the plaintiff which do not support his claims but in fact support the contentions of the defendants. Plaintiff must, therefore, go forward and produce evidentiary facts which will in fact support the contentions raised in his voluminous Complaint and briefs. This has not been done."

In the Court below, petitioner's principal argument in regard to Rule 56 seemed to be that an allegation of conspiracy raises a question of fact, or of factual inference, and, therefore, may not be properly disposed of on summary judgment. Petitioner could not be more mistaken if that is his theory here. *First Nat. Bank* v. *Cities Service Co.*, supra.

In affirming all the summary judgments rendered by Judges Hoffman and MacKenzie of the District Court, the Court of Appeals in its majority opinion said (Appendix to petitioner's brief, page 4a):

> "Winnowing the defendants' uncontroverted assertions and plaintiff's contessa [concessions] from the supporting and counter affidavits, interrogatories and depositions submitted with the motion, the trial judge found that the plaintiff failed to establish the combination or conspiracy, or the effectual or attempted monopolization, it laid to the defendants. His opinion threshes the record very thoroughly and demonstrates that the evidence does not disclose the presence of these indispensable elements even to the point of tendering a genuine issue thereon. *Norfolk Monument Company, Inc.*, v. *Woodlawn Memorial Gardens, Incorporated, et al,* 290 F.Supp. 1 (E.D.Va., October 3, 1967). We accept this refinement of the proof.
>
> "There was simply no direct evidence proffered by the plaintiff of a concert of action among the defendants. The only thing that the cemetery defendants had in common was that they engaged in the operation of cemeteries; each sold burial lots and maintained them. No joint activity is

disclosed—not even conferences or meetings. The closest evidence to this point was that defendant Matthews' sales representatives frequently visited the cemeteries on business calls. This poverty of proof scarcely made an issue of any kind—certainly none for a jury."

As the Court said in *Independent Iron Works* v. *United States Steel Corp.*, 322 F.2d 656, 661 (9th Cir. 1963) cert. den. 375 U.S. 922, 11 L.Ed.2d 165, 84 S.Ct. 267:

"Like businesses are generally conducted alike and, as the trial judge correctly stated, similarity in operations lacks probative significance unless present under circumstances which logically suggest joint agreement, as distinguished from individual action."

It should be pointed out here that Roosevelt was never a customer of Matthews and that there is not any evidence that sales representatives frequently visited Roosevelt's cemetery. Roosevelt has never purchased anything from Matthews (petitioner's brief, page 6).

The Court below further said (Appendix to petitioner's brief, page 5a):

"Moreover, the Complaint's allegations of conduct and circumstances suggesting a combination and monopoly failed for want of any tender of proof of them. The District Judge found the accusations wholly without foundation. On these points he said in his opinion:

'Plaintiff's allegations that Matthews would sell only to cemeteries is negated by its own admis-

sion that it purchased from Matthews as late as 1965 and terminated such purchases only because it did not like the Matthews product and because Matthews was then a defendant in this suit.

'Plaintiff's allegation that the defendant cemeteries bought only from Matthews was founded apparently on an inspection by the plaintiff's president of these cemeteries which indicated the installation of many of Matthews markers. He admitted, however, that he saw others and had had his company's markers installed therein on occasion. It was further shown that one defendant cemetery [namely, this respondent, Roosevelt] had no Matthews markers at all, that some had as many as fifty percent (50%) of a different brand; and that a composite reading of all of the installations in all of the cemeteries showed at least thirty percent (30%) of a different manufacturer.'

"Our canvass of the record verifies the dearth of proof in the particulars the District Judge first noted. A principal factor in plaintiff's contention of his exclusion from competition with the defendants is the cemeteries' regulations prohibiting outsiders from installing markers. The reasonableness of this rule was not weakened by the plaintiff's evidence and is on its face apparent, as the opinion manifests:

'Plaintiff's allegation that it is not allowed to install markers in the defendant cemeteries is admitted by the defendants. Each reserves to itself the right to install all markers, regard-

less of from whom purchased. In view of the continuing obligation of perpetual care imposed upon the cemeteries, in its contracts with lot owners, in the light of the duty as provided in the cemetery sales agreements made plain to purchasers, such rules and regulations cannot be termed unreasonable. This applies as well to rules setting up specific alloy content as to bronze markers offered for installation and certification thereof."

The Court below's affirmation is in accord with Judge Dobie's opinion in *Lawson* v. *Woodmere*, 217 F.2d 148, 151 (4th Cir. 1954) wherein he ruled:

"Of necessity the cemeteries have had to reserve the right at all times to adopt reasonable rules and regulations with respect to their maintenance. Every purchaser of a lot has made his purchase upon the understanding that the use of his lot will be subject to reasonable rules and regulations of the cemetery, and his deed contains such a provision. In the light of this duty to preserve the cemetery properties, Woodmere and Ridgelawn, we think, have the right to select the person or persons who shall perform services with respect to their properties and the right to prescribe and enforce the conditions upon which these services shall be performed."

The Court of Appeals below continued, saying (Appendix to petitioner's brief, page 6a):

"The chief feature urged as revealing conscious parallels of behavior by the defendant cemeteries —and thus evincing joint and concerted action—is

the fee demanded for installing the markers. Of this item the trial court said:

> 'The allegation that there is a conspiracy to be uncovered in the fact that the charges are made by the cemeteries for installation of markers, whether such charges be conscionable or unconscionable is not only not borne out but is denied in the plaintiff's own proffered exhibits of the different cemetery price scales. These show on their face a wide divergence of prices which would completely negative any systematic scheming or conscious parallelism. Plaintiff agreed that Matthews did not prescribe any charges.'"

The following are the total prices charged for installation and perpetual care by each of the defendant cemeteries as shown by petitioner's own Exhibit #11 (Vol. III, page 33) which do not reflect a uniformity or similarity of charges:

	Single Marker Installation Charges	Double Marker Installation Charges
Rosewood	$ 84.00	$154.00
Princess Anne	84.00	154.00
Woodlawn	175.00	175.00
Greenlawn	87.36	160.16
Roosevelt	43.60	71.60

In regard to these charges the Court below stated (Appendix to petitioner's brief, page 7a):

> "Moreover, the record points out that defendants' installation fees, in addition to being divergent, were arrived at by totally different pricing policies. One charges a flat fee regardless of size;

while the others charged a fee computed on the square inches of marker surface area; and these fees differed significantly."

Roosevelt charges $ .10 per square inch for installation and $10.00 per marker for perpetual care, or a total of $43.60 for installation and perpetual care of a single marker, as shown by petitioner's own depositions and affidavit in opposition (Vol. II, page 39, and Appendix to this brief, page 11a.)

The charges of the cemeteries vary significantly and none are as low as Roosevelt's. There is no evidence in the record to support Judge Craven's statement of Roosevelt's charges for installation in his dissenting opinion in the Court below as set out in the Appendix to petitioner's brief at page 12a. His erroneous figures were taken from a misstatement in the petitioner's brief to the Court below, and there is not even the slightest bit of evidence anywhere in the record to support them. Even petitioner's own affidavit in opposition shows that Judge Craven's figures are erroneous. (See Appendix to this brief, page 11a.)

Petitioner would have this Court to believe, as stated on page 7 of its brief, that it is placed at a competitive disadvantage by Roosevelt's charges. It is not without significance that the petitioner nowhere in its brief sets out what Roosevelt's installation charges are. Had the petitioner set out the same, it would have disclosed that the petitioner was netting $75.40 on the sale of its single marker at its admitted price of $190.00 and netting $131.40 on its admitted sales price of $375.00 for its double marker, after absorbing Roosevelt's installation and perpetual care charge of $43.60 and $71.60,

respectively, for single and double markers. Therefore, instead of suffering a loss as stated by the petitioner, it is reaping a handsome profit on the sale of each marker it sells for installation in Roosevelt's cemetery.

The Court below went on to say (Appendix to petitioner's brief, page 7a):

> "The exaction of the fee is accounted for by the memorial parks as embracing not alone the putting of the marker in place and keeping it clean, but also such items as the requisite constant watch over the condition of the markers, the repositioning of them when needed, and replacing them as necessary. The argument that the installation payment was designed solely to discourage plaintiff's sales by increasing the cost of its markers vanishes on consideration. Without it the cemeteries would be required to accept the plaintiff's markers without prospect of financial assistance in the attention to them in the future. No effort was made to show that the contributions to the Virginia statutory trust fund would suffice to provide the moneys necessary for this continued care. At all events the standard of care may vary in different parks, and the requisite reserve is a matter of good business judgment—surely not a jury issue."

> "The District Judge, too, altogether justified the utilization of summary judgment for decision although, granted it should be 'sparingly practiced'. *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 473 (1962); cf. *First National Bank of Arizona* v. *Cities Service Co.*, U.S. , 36 L. W. 4394 (1968). No prejudice is

shown by the plaintiff and a fair dispatch of the case was accomplished."

Plaintiff has failed to point to any evidence showing that Roosevelt was guilty of any offenses as alleged; moreover, plaintiff has been unable to produce any admissible probative evidence tending to show that Roosevelt had joined or knew of any conspiracy, or that a conspiracy, in fact, existed. Summary judgment is the proper remedy in such a case for no genuine issue of fact can exist without these elements.

> "An issue of fact is not genuine unless it has legal probative force as to a controlling issue." *Rubenstein* v. *Dr. Pepper Company*, 228 F.2d 528, 533 (8th Cir. 1955).

As the Court said in *Lundeen* v. *Cordner*, 356 F.2d 169, 170 (8th Cir. 1966):

> ". . . There is no doubt as to the law. To be entitled to a summary judgment, the moving party must 'adequately support' his motion. A motion is 'adequately supported' if it demonstrates that there are no genuine issues of fact. *Sartor* v. *Arkansas National Gas Corp.*; 321 U.S. 620, 64 S.Ct. 724, 88 L.Ed. 967 (1944). In affirming the holding of the trial Court, we went to great lengths to point out why we believed that the affidavits, the exhibits, and the inferences properly drawn therefrom were, indeed, sufficient to support a motion for summary judgment.
>
> "The law is equally clear that when a moving party presents an adequately supported motion for summary judgment (as was done herein) the adverse party must come forward with facts, not

allegations, which controvert the necessary facts set forth in the moving party's case. Rule 56 (e) clearly spells out this duty on the sanction of suffering a summary judgment."

The purpose of the summary judgment rule is to avoid useless trials because of the great waste of time and expense that they cause to the parties as well as the needless inconvenience to the Court. The District Court in the case at bar and also the Court below have stated that no genuine issue of fact exists for a jury.

Roosevelt has no reason to conspire with any respondent herein; no logical inference of conspiracy can be drawn from its conduct and no jury should be allowed to speculate in such a case. Even in a case where consciously parallel business practices have been proven, they are not sufficient evidence, in themselves, from which a jury may infer concerted action. In order for an inference of concerted action or conspiracy to arise from consciously parallel business practices against an accused, it is necessary for the accused to have acted "in apparent contradiction to its own self-interest," for only then is the accused's conduct "inconsistent with decisions independently arrived at." *Milgram* v. *Loew's, Inc.*, 192 F.2d 579, 583 (3rd Cir. 1951). There is not even any legally significant probative evidence of parallel business practices as far as Roosevelt is concerned, much less that of consciously parallel business practices. Moreover, Roosevelt has never acted in contradiction to its own self-interest. Roosevelt has always acted independently. There is no evidence from which a jury should be allowed to draw any inference of conspiracy. The record is completely devoid of any evidence from which a conspiracy could be reasonably inferred.

C. Petitioner Has Not Met Any of the Requirements Essential to a Recovery on a Sherman Act Claim.

In order for petitioner to recover from this respondent, it would be necessary for him to prove that Roosevelt, acting in concert, combined and conspired to injure him in the operation of his monument business, that respondents' acts were the proximate cause of petitioner's injury and that petitioner suffered damages in an ascertainable amount as a result of respondents' acts. Even with all the discovery that petitioner had, he was wholly unable to make any showing that any one of these essential elements were present on respondents' motions for summary judgment. The Court must enter summary judgment upon motion, if there is nothing for a jury to decide.

As the Court said in *Seago* v. *North Carolina Theatres, Inc.*, supra, 639:

> "If the evidence construed most favorable in behalf of the plaintiff would justify or require a directed verdict against him, the Court should enter summary judgment for the defendants. *Dulansky* v. *Iowa-Illinois Gas and Electric Co.*, 10 F.R.D. 566 (S.D. Iowa 1950), *Dewey* v. *Clark*, 86 U.S. App. D.C. 137, 180 F.2d 766 (1950). A popular formula is that summary judgment should be granted on the same kind of showing as would permit direction of a verdict were the case to be tried. *Sartor* v. *Arkansas Natural Gas Corporation*, 321 U.S. 620, 64 S.Ct. 724, 88 L.Ed. 967 (1944). The theory underlying a motion for summary judgment is substantially the same as that underlying a motion for directed verdict. The essence of both motions is that there is

no genuine issue of material fact to be resolved by the trier of facts. . . ."

The Court's conclusion in *Seago* v. *North Carolina Theatres, Inc.*, Id., 640, is also suitable here:

> "Plaintiff has not offered any evidence of a common plan, scheme or design among the alleged conspirators. He has not offered any evidence which would allow him to prove conspiracy by similarity of conduct in that the record does not disclose evidence of a mutual awareness of action or conscious parallelism.
>
> "The plaintiff has presented a very forceful case in his Complaint, but he has been unable to support his allegations by evidentiary facts as he must do to resist the motion for summary judgment. Plaintiff has used many of the stock phrases which have been identified with this type of action, but when the Court examines that part of his contentions which remain after disregarding that which is legally insufficient or mere surplusage, it becomes clear that his claim is without substance."

CONCLUSION

For all the foregoing reasons it is respectfully submitted that the petition for certiorari should be denied. There is no issue in this case which warrants the attention of this Court. The petition presents no question of law which has been decided in a way in conflict with applicable decisions of this Court. The petition presents no question of law which has not been, but should be settled by this Court. The jurisdiction of this Court has not been properly invoked.

Respectfully submitted,

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